No. 2409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. STERN and B. FLEISCHER, partners doing business under the firm name and style of J. STERN & COMPANY,

Appellants,

vs.

CARLOTTA C. FERNANDEZ and THOMAS B. FERNANDEZ, executrix and executor of the last will and testament of B. FERNANDEZ, deceased,

Appellees.

Upon Appeal From the United States District Court for the Northern District of California.

BRIEF FOR APPELLANTS.

NATHAN H. FRANK,
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BRIEF FOR APPELLANTS.

In this case, the respondent took on board of his vessel a cargo of beans, belonging to the libelants, for transportation down the Sacramento river to the port of San Francisco, for which he issued his bill of lading.

The cargo consisted of 1008 sacks of beans, 125 sacks of which were stowed in the hold aft of the after mast (pp. 85-86), and the balance on deck, five tiers high (p. 88). In all, there was 45 tons of cargo (p. 84), and this distribution would make about 5½ tons in the hold, and 39½ tons on deck.

Immediately after the vessel was laden, she started on her voyage, and had progressed not exceeding two hundred feet (p. 90) when she ran into the bank, sheered off, and capsized, losing and destroying her entire cargo. She turned over almost immediately after she struck. She had not proceeded over 50 feet after striking the bank before she upset. The captain thinks it was 5 minutes (p. 94). At the time she struck the bank, she made a small hole in her side, about 5 or 6 inches below the water line (p. 93).

The man in command of the vessel was named Ewald, and this was his first trip as master. Previous to that he had served as deck hand (pp. 43 and 96), for 2½ years (p. 77), and at the time of testifying he was serving as deck hand on the "L'Aguador". The deck hand on the "Bernard" is "mate, cook, bottle washer and deck hand" (p. 88).

He was employed as master for the trip in question because the captain "did not show up." Mr. Tietjen, the manager of the vessel, told Ewald to get a man and make the trip and he (Tietjen) would make him captain when he came back (p. 44). The only knowledge Tietjen had of his competency as a master was the fact that he had been deck hand for two years,

and, about a year previous to this trip, the then master had told Tietjen that Ewald "was a good man", undoubtedly meaning he was a good man as a deck hand (pp. 44-45-46).

Under this state of facts, the defenses are urged:

1. That the loss was due to a peril of the sea.

2. That the owner is relieved from liability by the terms of the Harter Act.

3. That the owner is entitled to limit his liability to the value of the sunken vessel.

The District Court held that the vessel was properly fitted and manned, and that the loss was due to a peril of the sea, and the question presented by this appeal is whether or no the loss was due to a peril of the sea, and if not due to a peril of the sea, was the vessel seaworthy for the voyage in question.

WHAT WAS THE PERIL OF THE SEA?

The loss was due to one of two causes, viz.: either it was due to a puff of wind causing her to sheer and strike the bank, by reason of which she received a wound that let sufficient water into her to capsize her, or she capsized because she was laden so as to make her top-heavy and hence unseaworthy.

Assuming that the puff of wind was what caused her to strike the bank, neither the puff of wind, nor the hole caused by striking the bank, is a "peril of the sea."

Leaving the question of her improper lading for independent consideration, and adopting respondent's contention as to the cause of the accident, the injury received by striking the bank and consequent influx of water, is not the proximate cause of the damage. That must be referred back to the "puff of wind", which, according to respondent's contention, caused the vessel to sheer into the bank.

This proposition is settled in the decision of The G. R. Booth, 171 U. S. 450. It was there held that damage to one part of the cargo by sea water entering a hole in the ship's side due to the explosion of another part of the cargo, was not due to a peril of the sea; that though the damage was occasioned by sea water, it was the explosion, and not the sea water, that was the proximate cause of the damage.

The cases illustrating the proposition are fully reviewed by the court, and the principle with which this

court is familiar, was applied to the exception, in a bill of lading, of "perils of the sea", viz.:

> "The question is not what cause is nearest in time or place to the catastrophe. That is not the meaning of the maxim, causa proxima non remota spectatur. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other, that the nearest is, of course, to be charged with the disaster."

Now, was this "puff of wind" a peril of the sea?

It is equally well settled that the ordinary perils which could reasonably be anticipated on the projected voyage, are *not* "perils of the sea" within the meaning of the term as used in the exceptions to a contract of carriage.

In the language of De Haven, J., in The Arctic Bird, 109 Fed. 169,

> "The phrase 'perils of the sea' has reference only to those accidents peculiar to navigation, that are of an extraordinary character, or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

In this statement, Judge De Haven was quoting the language of Judge Story in The Reeside, which is also quoted by the court in Insurance Co. v. Easton Etc. Trans. Co., 97 Fed. *655*, with the suggestion that it

is approved in GARRISON v. INSURANCE Co., 19 How. 312. In INSURANCE Co. v. EASTON ETC., it is introduced with the assertion that

> "Whatever may be the test of a peril of the seas, this much at least, may be safely said: The injurious force must be unusual; it must be out of the ordinary run of events,—such a violent happening *as is not fairly to be expected.*"

In that case a barge, on which the cargo was laden, was injured by bumping against another by reason of a fresh breeze encountered on the voyage, and the court held that the breeze was "not stronger than might be expected upon any voyage in the Chesapeake Bay during the month of October, and that hence the injury was not due to a peril of the sea."

So, too, in THE WESTMINISTER, 127 Fed. 680 (C. C. A.), it was held that the circumstances must be such "as could not have been anticipated and guarded against by the exercise of ordinary care and prudence", and the fact is adverted to that though the voyage was *tempestuous,* it was not beyond that which was to be expected on the Atlantic in March.

Finally (because in the end we shall contend that in any view of the facts the loss was due to the incompetency of the master), we call attention to the definition given by CHANCELLOR KENT, 3 Comm. 300:

> "The ignorance or inattention of the master or mariners is not one of the perils of the sea. Those words apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. *Quod fato contingit et cuivis patrifamilias,*

quamvis diligentissimo possit contingere. The imprudence, *or want of skill in the master,* may have been unforeseen, but it is not a fortuitous event."

The effect of the words "peril of the sea" and like expressions, whether used in policies of marine insurance, bills of lading, or charter parties, is modified in all cases by the implied warranty of seaworthiness in much the same way as by the implied contract against negligence in contracts of carriage. If the loss proximately results from a breach of this warranty it will be attributed to that cause, notwithstanding the existence of the sea peril. The Edwin I. Morrison, 153 U. S. 199; The Caledonia, 157 U. S. 124.

With these principles in mind, what are the facts respecting the "puff of wind" in its relation to the accident?

The testimony on this subject is confined to the deposition of Paul Ewald, the master, and is epitomized in his first statement upon the subject (p. 78), where he says:

> "Well, we set sail on Monday morning. We pulled across the river and there was a westerly wind blowing. We set the mainsail and jib, and we started off for home, and I told the man to go forward and hoist the foresail, and a *puff of wind* came up from the northwest,—*the winds are pretty uncertain up the river.* We had the helm hard down, and she sheered and went into the bank there and struck a snag there or a rut, and she made a hole in her starboard bow."
>
> "Q. What happened?
>
> A. We sheered her off, and I noticed she acted funny, and I tried to get on the other side, but before we got there she turned over."

Concerning this puff of wind, he says, in answer to a question as to whether or no the winds on the creek blow steadily:

> "No, sir, the winds are pretty uncertain; you get amongst a bunch of trees, and a puff of wind comes up, and all at once it is calm again. *You always have to be on the alert*" (p. 82).

When asked how sailing vessels are liable to act when the wind changes suddenly, or comes in puffs, such as he got that morning, he answers (p. 83):

> "Some of them will pay off, some of them will luff up to the wind.
>
> Q. What did the 'Frances E. M. Bernard' do that morning, pay off, or luff up?
>
> A. She luffed up; she went right to windward."

He spoke of the "puff" as the wind shifting from the northwest, and he is asked (p. 89):

> "Q. How long did it take it to haul to the northwest?
>
> A. It seems to come in a puff.
>
> Q. That is all, just one puff?
>
> A. Yes, sir; I had to put the helm hard up; she would not sheer up, she just kept on going" (p. 89).

He had had trouble with the "Bernard" in not answering her helm, before, and does not know the reason (pp. 98-99), though he contends that "any other scow would have done the same thing with that puff of wind; it was almost impossible to keep her off the bank" (p. 101). "She must be a *very sharp vessel,* and a change of wind will affect the vessel (p. 102).

From the foregoing, it would appear that the puff of wind in question is an usual and ordinary incident on that voyage: "The winds are pretty uncertain, you get amongst a bunch of trees, and the puff of wind comes up and all at once it is calm again. You always have to be on the alert," and when such puff of wind comes, some vessels "will pay off, some of them will luff up into the wind."

Under these circumstances, it seems clear that the accident in question was not the result of a peril of the sea.

ACCIDENT DUE TO UNSEAWORTHINESS.

Was it, then, due to a "fault or error in navigation", or to the incompetency of the master, or the incapacity of the vessel to mind her helm? If it was either of the latter, the vessel was unseaworthy, and respondent is not entitled to the benefit of either the Harter Act, or the Act limiting liability.

This court has very thoroughly discussed the nature of the liability of a carrier with respect to the burden of proof, and the evidence necessary to sustain it, in the case of THE MEDEA, 179 Fed. 781, and among other cases there referred to, is the case of THE MOHLER, 88 U. S. 230, upon which this court comments as follows:

> "In the case of The Mohler, 88 U. S. 230, 233, a cargo of wheat had been shipped on a barge appurtenant to the steamer Mohler at Mankato, on the Minnesota river, destined for St. Paul on the Mississippi. The bill of lading contained the usual exception of the 'damages of navigation.' The barge was wrecked by collision with one of the piers of a bridge just above the city of St. Paul and was totally lost. The answer set up that the accident occurred through the sudden and unexpected gust of wind which overtook the boat as she passed through the piers, and that, therefore, she was unanswerable for the collision. The case was heard on the testimony introduced by the respondents, the libelants having called no witnesses. The Supreme Court held that:
>
> 'The burden of proof lies on the carrier, and *nothing short of clear proof, leaving no reasonable doubt for controversy,* should be permitted to discharge him from duties which the law has annexed to his employment.' "

The court also quotes from THE NEW JERSEY STEAM NAVIGATION CO. v. MERCHANTS BANK, the statement that:

> "The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

So, also, we find the court in the case of THE EDWIN I. MORRISON, 153 U. S. *215*, giving expression to the following regarding the evidence:

> "We are unwilling by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate to relax the important and salutary rule in respect of seaworthiness."

In view of these authorities, what is the evidence concerning the vessel's seaworthiness in respect to the competency of the master?

As already stated, this was his first trip as master, and he was not in fact licensed, so no presumption arises in his favor.

Previous to this trip, he had served as a deck hand, which, according to his own statement, is a man who acts in the several capacities of "mate, cook, bottle washer and deck hand." He had been serving in this capacity for 2½ years previous to the accident, and at the time of testifying, he was again serving as a deck hand.

Mr. Tietjen, the witness who was called to testify regarding this master's competency, and who had placed him in command for this trip, states that he placed him in command because the captain of the

vessel "did not show up", and Mr. Tietjen, the manager, desired to get the vessel off. He therefore told Ewald to get a man to make the trip, and when he returned he would make him captain, meaning thereby that he would enter him in the Custom House as master. The only knowledge which Mr. Tietjen had of his competency to go as master, was the fact that about a year previous to so appointing him, the master of the "Bernard" had told Tietjen that this man "was a good man", undoubtedly meaning that he was a good man as a deck hand.

> "Q. He was not recommending him, then, to be captain of the vessel?
> A. No; I had no show to put him captain.
> Q. He was the deck hand on the vessel, and the captain in conversation with you said he was a good man; that is the substance of it?
> A. Yes.
> Q. That is all there was to it?
> A. Yes" (p. 45).

Is that such "clear proof leaving no reasonable doubt for controversy" of his ability to go as master so as to render the vessel seaworthy?

In view of the accident happening as it did by reason of a "puff of wind", which is an ordinary incident to be expected on such a voyage, taken in connection with the foregoing facts, is not the presumption almost inevitable that the accident was the result of his incompetency? The Cygnet, 126 Fed. 742.

In addition to this, we make the contention that the vessel was improperly laden (also by reason of his

incompetency), in this: That he placed 5½ tons under deck, and 39½ tons on deck, the deck load being five tiers high, and this, if not the sole cause of the capsizing of the vessel, was a contributing cause.

Upon this subject, the respondent has offered the testimony of the manager of the vessel, who was himself responsible for the captain, who says that at one time he had 50 tons of coal on her, 45 on deck, "and she sailed up the river all right; and he considered that she was properly loaded, enough to beat down on; she would be stiff enough to sail on" (p. 38). This loading to which he testified, occurred "eighteen or twenty years ago", and the only way that he knows she was so laden, is because

> "I was down there when she took it in, and the captain said that he put five tons in the hold, and I said, 'Is she stiff enough with that?' And he said, 'Yes, she is stiff enough for sailing.' He said 'She is all right.' I never sailed her myself."
>
> "Q. You never sailed her yourself?
>
> A. No.
>
> Q. And you had nothing to do with the loading of her at this time?
>
> A. No, sir.
>
> Q. All you know about it is that the captain told you she had five tons in the hold?
>
> A. Yes, sir.
>
> Q. That is all you know about the transaction?
>
> A. I was there when she took in five tons; I asked him if that was all she required, and he said yes" (pp. 41-42).

Again:

> "Q. Of course, you did not go with her?
>
> A. No, sir.

Q. And you don't know anything about the nature of the winds and the weather on that trip?

A. No, sir, I don't remember anything about that.

Q. And you do not know anything about how she acted or behaved?

A. No.

Q. All you know is that she did not capsize?

A. She did not capsize. She came back all right" (pp. 42-43).

With respect to other loads which she has carried, he says that she carried the hay on deck.

"Of course she had a load full of hay and would carry as much as she could. *With barley,* we would not *fill* the hold because it was hard to get at" (p. 47).

John Erickson, who had been handling schooners for about 21 years, but who had not navigated them any more than had Mr. Tietjen, or attended to the loading of them, except in the manner that Mr. Tietjen had, when asked what he would say with reference to loading the "Bernard" with 5 tons under deck, and 40 tons on deck, as to whether or not that is a proper means of loading a vessel, says:

"Well, it don't look to be hardly enough in the hold."

"You think that under those circumstances she would be improperly loaded?

A. I would rule that she ought to have about one-third of it in the hold, or something like that. Of course some vessels are different from others" (pp. 60-61).

On cross-examination, he is asked:

"Q. Most of these scows are built so as to carry the cargo on the deck, are they not?

A. Well, they carry a certain portion on deck; they carry about two-thirds on deck and about *one-third in the hold. That is about the rule with them.*

Q. That is with some scows?

A. *Most all of them''* (p. 61).

"Some of them are built so they carry nothing in the hold'' (p. 61).

When asked about the scows that he is managing, he mentions two, with about 6½ ft. hold, that would carry about ½ in the hold, and ½ on deck (p. 62).

He also mentions one, which he says was built about the same as the "Bernard".

On cross-examination he admits that captains may disagree on the way to load a vessel, one man may think it is all right loaded a certain way, and another fellow may think it ought to be a little different—the man who is in the vessel would know more about how to load her, but

"Q. If a man had nothing to do with loading the vessel before, but was only deck-hand, cook and bottle-washer, you would not place very much reliance on his judgment, would you, after two years of that experience?

A. No, because some men don't take much notice'' (p. 66).

The evidence on this subject is certainly not very satisfactory evidence of her proper lading. It is certainly not "clear proof, leaving no reasonable doubt for controversy."

Even though equal credit be given to both witnesses, the burden of proof being on the respondent, such

testimony could not prevail. But even that condition does not exist. We do not think that equal credit should be given to both witnesses, because, while with respect to experience they are probably upon an equal footing, yet Mr. Tietjen is open to the suggestion of bias, due to his connection with and moral responsibility for this loss.

In addition, we have the fact that it is common knowledge that a high deck load, with nothing underneath to counterbalance it, makes for instability, and if a vessel be stable in that condition, she is an exception to the rule. We have no doubt that there are scows that carry large deck loads, but they are broad square vessels, which is not the case with the "Bernard", which "was a schooner built scow, with a running stern like a sailing vessel; *she was not a flat-bottom boat,* she was a schooner built boat." She has a "sharp bow and a running stern" (Ewald, p. 86).

Appreciating the situation thus disclosed with respect to her instability, respondent attempts to account for her capsizing by contending that water flowed into her hold, and that the water caused her to capsize.

Here, again, he is depending upon uncertain and inconclusive testimony as to the amount of water that got into the vessel, and upon an inference not supported by the testimony.

Ewald makes the general statement, in response to a leading question, that she filled with water and capsized.

"Q. What made her turn over?
A. The water got in the hold.
Q. She filled with water?
A. She filled with water and capsized" (p. 79).

This, however, is a mere assumption on the part of the witness. He saw no water in the vessel. He did not even know that she had sprung a leak, until after she was raised. He says (p. 82):

"A. After she struck I know she acted funny right away and I says to this man there must be something the matter with her. He says 'I cannot see nothing the matter with her.' I tried to get her across the river to see what the trouble was with the boat and before we got half way she turned turtle and I had just time enough to lower down the mainsail, foresail, and the jib. Of course, at that time, the man and I was overboard; *the deck-load shifted,* the beans shifted, dumped over in the water. Of course, we was spilled into the water and the man and I, we swam for the shore" (p. 82).

Speaking of the time she struck the bank, he is asked:

"Q. How long did you sail after that before she capsized?
A. We struck the bank there and she sheered off, and then the mainsail jibed and all the remaining sails jibed and just about there where the arrow is—I was halfways across, she turned over.
Q. As quick as that?
A. Yes, sir; she jibed over quick.
Q. Then she turned over almost immediately after she struck?
A. Almost.
Q. There was no appreciable time between the time of striking and upsetting?
A. No, sir; five minutes.

Q. The river is about 150 feet wide there and you probably went 50 feet from the bank when you upset?

A. Yes, sir.

Q. And you were coming pretty quick at that time, weren't you?

A. From the place it did not take any time.

Q. It must have been a few seconds.

A. Five seconds, I should think.

Q. Would it take you five minutes to go 50 the way you were going then?

A. I had time to lower the mainsail, foresail and the jib; I let go the helm and they dropped right off.

Q. They dropped right off?

A. That is all the time I had.

Q. You did it yourself, or the other man?

A. I told him to let go the jib.

Q. He was there?

A. Yes, sir.

Q. And you let go the mainsail?

A. The mainsail and foresail.

* * * * *

Q. And before they were down she was over?

A. Yes, sir.

Q. So you don't know, as a matter of fact, whether she filled with water or what actually happened. All you know is as soon as she struck the bank you dropped the sails and by the time you had them dropped she turned turtle? That is all you know about it?

A. Yes, sir'' (pp. 93-94-95).

The hole was about 4, 5 or 6 inches below the water line when she was on an even keel (p. 93), and, as the master says, ''I guess I could have put my hand through the hole'' (p. 101).

Of course, a hole 4 or 5 or 6 inches below the water line on an even keel, would be raised out of

the water with very little list in the opposite direction, and as the master says that immediately she struck she sheered, and almost immediately turned over, having gone but 50 feet from the bank, the hole could not have been under water sufficiently long to have taken any appreciable amount into the hold.

It is unreasonable to expect us to believe, under these circumstances, that it was the water she took on board that capsized her. She had just started on her voyage and her "acting funny" was undoubtedly due to the nature of her loading.

The testimony to the contrary is not only not "clear, leaving no reasonable doubt for controversy", but, on the contrary, it is unreasonable.

We respectfully submit, that not only has the respondent failed to sustain the burden of proof to show that the vessel was seaworthy, either in respect to her manning or her loading, but that the very nature of the accident itself raises a strong presumption of improper lading, and consequently of incompetency on the part of the master, and in this matter of incompetency, the owner was privy. McGill v. Steamship Co., 144 Fed. 795-6; Wellesley v. C. A. Hooper, 185 Fed. 737.

Respectfully submitted,

Nathan H. Frank,
Irving H. Frank,
Proctors for Appellants.

(see insert - next page)

EPITOME OF THE CASE ON IMPROPER LOADING.

Vessels do not capsize normally.

If they do capsize, the burden is on the shipowner to prove a cause relieving him from liability,

> "and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."
>
> "The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties." THE MEDEA, 179 Fed. 781.

The respondent's only reply is an assumption or inference that the vessel took in sufficient water to make her capsize.

The only testimony upon this subject is that of Ewald, pp. 79, 82, 93, 94, 95 and 101, which shows that his statement that she filled with water is a mere assumption upon his part.

This inference or assumption is met by the contrary inference that a stable vessel with a hole large enough to put your hand through, 4 or 5 or 6 inches below the water line, on an even keel, will not take in an appreciable amount of water within five minutes, and particularly when she is sheered so as to list to the other side.

> "Q. So you don't know, as a matter of fact, whether she filled with water, or what actually happened. All you know is as soon as she struck the bank you dropped the sails, and by the time you

had them dropped she turned turtle. That is all you know about it?

A. Yes, sir." (pp. 94-95.)

This is not clear proof, leaving no reasonable doubt for controversy. It does "depend upon implication or inference founded on doubtful evidence".

Under the circumstances, the natural presumption is that the vessel was improperly laden.

COMMON CARRIER.

Respondent has offered the suggestion that the vessel in this case was not a common carrier, and therefore is to be held only to ordinary care.

It is unnecessary to discuss this proposition. There are respectable authorities holding either way with respect to the degree of care required under such circumstances.

We would judge from the language of the Supreme Court in several cases, that the fact that a vessel is not a common carrier does not change the nature of its liability. Without making an examination of the cases to determine the extent of the expressions of the Supreme Court upon the subject, we content ourselves by calling attention to the language of the court in the case of The Caledonia, 157 U. S. 134-35, where the court cites with approval the language of Judge Kent in his Commentaries, where, in speaking of the warranty of seaworthiness, he said:

> "It is an implied warranty in the contract, that the ship be sound for the voyage, and the owner, *like a common carrier* is an insurer against *everything* but the excepted perils."

At another place in said decision, in commenting upon the reasoning in the case of READHEAD vs. MIDLAND R. R. Co., the Supreme Court remarked:

> "But the court was careful to point out the broad distinction between the liabilities of common carriers of goods and of passengers, and in the case at bar *the shipowner* was not only liable *as such,* but as a common carrier, and subject to the responsibilities of that relation."

The case cited by libelant refers to a discussion of the subject in the English case of NUGENT vs. SMITH, "in which a liability *like that* of a common carrier was upheld", but was subsequently overruled in the court of appeals.

The similarity of this language to the language above quoted from KENT by our Supreme Court might possibly lead to the conclusion that the leaning of the Supreme Court is to a holding that the liability, though not that of a common carrier, was like that of a common carrier, and we are inclined to believe that that will be the ultimate decision, in view of the uniform holding against vessels [without distinction as to whether they be common carriers or not] that their liability is in the nature of insurers.

However, in the present case that question is immaterial, because it must be conceded that the warranty of seaworthiness, which is an implied warranty

in the contract of carriage by sea, is absolute, and does not depend upon whether or no the vessel be a common carrier. That distinction is recognized in SUMNER vs. CASWELL, relied upon by the respondent, as well as in the more recent case of THE ROYAL SCEPTRE, 187 Fed. 224. In both of those cases the question as to whether or no the vessel was a common carrier, was held to be immaterial.

A like question was involved, but not raised, in the case of the S. S. WELLESLEY Co. vs. HOOPER, 185 Fed. 737, before this court.

MOTION TO DISMISS.

That matter is not at issue before this court.

In the first place, the granting or denial of the motion, is a matter of discretion with the lower court, and not the subject of review here.

In the second place, the present record shows that the discretion of the court was properly exercised, inasmuch as the affidavit on which the motion to dismiss is founded, did not truly state the facts.

That affidavit sets forth that Fernandez was dead, and that his executor was not acquainted with the facts

> "nor have I any knowledge or information upon which to prepare a defense thereto, my belief being that the whole of the facts and information necessary to prepare a defense to said action were in

the possession of the defendant alone at the time of his death." (p. 13.)

At the trial, however, they were at no loss for testimony. The vessel was not managed by the deceased, but by B. H. Tietjen, who had possession of all the facts necessary for a defense, and who was called as a witness, and the master of the vessel, who was the only one outside his deck hand who knew anything about the facts, was also called, and testified fully in regard thereto. No element of material testimony that ever had been in the possession of the respondent, is lacking in the record.

In the third place, if there be laches, both parties are equally guilty. The respondent had as much right to set the matter for hearing as had the libelant, and cannot profit by his own laches simply because libelant was equally guilty.

THE EXCEPTIONS TO THE LIBEL.

They were not for want of sufficient facts to state a cause of action, but only for uncertainty (pp. 8-9). Hence, the question of failure to state ownership of vessel was not raised.

Libel was subsequently amended so as to allege ownership (pp. 104-5).